

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL L. FYE)	
Claimant)	
VS.)	
)	Docket Nos. 157,149 & 157,150
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

ON April 28, 1994, the applications of the respondent and the Kansas Workers Compensation Fund for review of an Award entered by Administrative Law Judge Shannon S. Krysl, dated January 27, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Chris A. Clements of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Steven L. Foulston of Wichita, Kansas. There were no other appearances.

RECORD

The record considered on appeal is the same as that set forth in the January 27, 1994 Award of the Administrative Law Judge.

ISSUES

The respondent appeals from the finding of the Administrative Law Judge regarding the nature and extent of claimant's disability. The Kansas Workers Compensation Fund appeals from the finding that the employer had knowledge of a condition which constitutes a handicap to obtaining or retaining employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board agrees with and adopts the findings of the Administrative Law Judge relating to the nature and extent of claimant's disability. Specifically, the Appeals Board finds that claimant has a thirty-two and one-half (32.5%) permanent partial general disability.

Claimant worked at Boeing as a sheet metal mechanic. His duties included drilling, riveting, buckling and light subassembly. He was required to drill forty to fifty (40-50) holes per hour for an eight (8) hour day and his job required him to lift from fifty to one-hundred (50-100) pounds by himself.

While performing his duties, claimant began experiencing burning pain first in one arm and then the other and then in both shoulders. He was seen at Boeing Central Medical and then referred to Dr. Garrett Watts, a board-certified orthopedic surgeon. He was later referred to Dr. Paul Lesko, also a board-certified orthopedist.

Dr. Watts diagnosed lateral epicondylitis of the right elbow and prescribed conservative treatment. As claimant continued to work he developed impingement syndrome of his shoulder and epicondylitis in his left elbow. He also was diagnosed as having subacromial bursitis.

Dr. Lesko ordered MRIs performed on both shoulders and then performed arthroscopic surgery on both shoulders. Claimant was ultimately released to work with restrictions but was terminated after one (1) day of work for reasons unrelated to his medical condition.

After the surgery, claimant was referred to Dr. Schlachter for evaluation. Dr. Schlachter found diffuse tenderness about both shoulder girdles and along both trapezii muscles. He noted marked pain with use of the rotator cuff, more on the right than the left. He also found moderate constant crepitus of the right shoulder and mild crepitus of the left shoulder. Claimant was tender to palpation of the elbows but there were no sensory deficits and no atrophy. Dr. Schlachter diagnosed tendinitis and impingement syndrome of both shoulders following rotator cuff tear and surgery. He rated claimant's functional

impairment as fifteen percent (15%) to the body as a whole due to the right shoulder and ten percent (10%) due to the left. He combined these to arrive at the twenty-four percent (24%) permanent partial impairment of function to the body as a whole. He recommended permanent restrictions of no work above horizontal, no single lifts greater than forty (40) pounds, no repetitive lifts greater than thirty (30) pounds, no lifts greater than ten (10) pounds with the arms outstretched, and no repetitive pushing or pulling motions.

The only expert opinion testimony regarding factors considered in work disability was that given by Jerry Hardin. Mr. Hardin testified that claimant has a sixty to sixty-five percent (60-65%) reduction in ability to obtain employment in the open labor market and a fifty percent (50%) reduction in wage earning ability. Mr. Hardin's opinions were based upon restrictions recommended by Dr. Schlachter.

The Appeals Board agrees with the Administrative Law Judge's award of work disability. Upon review of the medical testimony and that of the claimant, the Appeals Board concludes that more likely than not that claimant would not have been able to perform regular duties of his pre-injury job. He testified that he could not and the restrictions recommended by Dr. Schlachter would preclude the work he described. This is true even though he was temporarily placed and provided employment at a comparable wage. The Appeals Board finds the evidence overcomes a presumption of no work disability created by claimant's return to work for one (1) day. The Appeals Board is not, however, willing to afford the claimant the full benefit of the projected wage loss because it does appear that the immediate loss of claimant's comparable wage was due to unrelated factors, specifically his violation of a last-chance agreement. One cannot assume that the employer would not have provided an accommodation to his disability at a wage comparable to the pre-injury wage. Under the circumstances, the Appeals Board considers it appropriate to weigh equally zero percent (0%) wage loss and the sixty-five percent (65%) loss of access to the open labor market and finds thirty-two and one-half percent (32.5%) work disability.

The Appeals Board also finds respondent has failed to meet its burden of establishing that it has retained claimant in its employment with the knowledge of a pre-existing handicap. Claimant testified at the regular hearing that he first saw Dr. Watts with complaints relating to the right elbow. He was off work for about two (2) weeks and returned to work with restrictions. He did not recall what the restrictions were. He answered in the affirmative when asked whether he began utilizing his left hand to compensate for his right and therefore developed problems with his left shoulder, arm and hand. In response to later questions by the Kansas Workers Compensation Fund attorney, he provides somewhat different answers. When asked whether he was having problems with both shoulders when he first went to Boeing Central Medical he answered that he could not remember. A history of problems first on the right and then the left is found in Dr. Schlachter's report. When asked whether the history was accurate, claimant stated that it was close enough.

The employer is entitled to be relieved of its liability only upon a showing that it employed or retained the claimant with knowledge that claimant was a handicapped employee. Johnson v. Kansas Neurological Institute, 240 Kan. 123, 727 P.2d 912 (1986). In this case, the evidence relating to the development of claimant's injuries first on one side and then the other remains unclear. Respondent's knowledge of claimant's handicap, if any, also remains unclear. The Appeals Board finds that respondent has failed to meet its burden of showing that it had knowledge of claimant's handicap prior to a second injury to the left side. Accordingly, respondent's request to impose liability on the Workers Compensation Fund is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl is hereby modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Michael L. Fye, and against the respondent, Boeing Military Airplanes, and the insurance carrier, Aetna Casualty & Surety Company, for an accidental injury sustained on September 26, 1989.

The claimant is entitled to 33 weeks temporary total disability at the rate of \$271.00 per week or \$8,943.00 followed by 382 weeks at \$179.05 or \$68,397.10 for a 32.5% permanent partial general body disability, making a total award of \$77,340.10.

As of January 25, 1994, there would be due and owing to the claimant 33 weeks temporary total compensation at \$271 per week in the sum of \$8,943.00 plus 193 weeks permanent partial compensation at \$179.05 per week in the sum of \$34,556.65 for a total due and owing of \$43,499.65 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$33,840.45 shall be paid at \$179.05 per week for 189 weeks or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The Workers Compensation Fund is responsible for payment of its own attorney's fees.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Respondent to be paid direct as follows:

Deposition Services	
Transcript of preliminary hearing	\$56.30
Barber & Associates	
Transcript of preliminary hearing	\$84.50
Transcript of regular hearing	\$96.70
Deposition of Jerry D. Hardin	\$334.80
Don K. Smith & Associates	
Deposition of Ernest R. Schlachter, M.D.	\$219.00
Ireland Court Reporting	
Deposition of Michael Fye	\$184.45

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, 1861 N. Rock Road, Suite 320, Wichita, KS 67206
Vaughn Burkholder, 700 Fourth Financial Center, Wichita, KS 67202
Steven L. Foulston, PO Box 48128, Wichita, KS 67201
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director